

EON Bank Bhd v Hotel Flamingo and Another Case**A**

HIGH COURT (MELAKA) — ORIGINATING SUMMONS NO 24(31)–31 OF
1987 AND CIVIL SUIT NO 22–39 OF 1896

LOW HOP BING J
22 DECEMBER 2004

B

Evidence — Burden of proof — Forgery of signature — Difference between onus and burden of proof — Denial of execution of document — Parties bearing burden of proof — Evidence Act 1950 ss 68 & 101

C

Evidence — Documentary evidence — Forgery of document — Proof of signature — Whether signature in attested document must be proved — Evidence Act 1950 s 67

Evidence — Expert evidence — Handwriting — Insufficient comparison samples — Burden of proof — Whether forgery proved

D

Evidence — Adverse inference — Failure to call material witness — Executor of document not called as witness — No legal requirement for amendment to document to be initialled by maker — Whether adverse inference to apply — Evidence Act 1950 s 114(g)

E

Land Law — Charge — Amendment — Instrument — Whether must be initialled by chargor — Whether initialled by attesting solicitors sufficient — National Land Code Fifth and Tenth Schedule

F

Land Law — Sale of land — Order for — Cause to contrary — Forgery/insufficient instrument — Whether burden on chargor — National Land Code ss 256(3) & 340(2)(b)

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The defendant, a hotel, had executed a power of attorney in favour of Quah Lian Eng ('the power of attorney to Quah') concerning the defendant's property in Melaka Tengah ('the property'). The plaintiff, a bank, gave banking facility to Lamont Trading, where Quah was a director, upon which one Maung executed a third party charge ('the charge') in favour of the plaintiff on the authority of the power of attorney granted by Quah to Maung over the property ('the power of attorney from Quah to Maung'). The power of attorney from Quah to Maung was executed before and authenticated by a lawyer who was not called as a witness. Upon default of the defendant, the plaintiff filed the charge action against the defendant ('the charge action'). The defendant in response filed a civil suit against the plaintiff ('the civil suit') alleging that the charge was defeasible as it was executed pursuant to an insufficient or void instrument, wherein Quah's signature had been forged, as a result of which Maung's execution of the charge was wrongful. Both proceedings were heard together.

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The defendant called two document examiners, *viz* SP1 and SP2, both of which testified that there were insufficient acceptable sample signatures for comparison. The plaintiff submitted that since the defendant had alleged forgery

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- A** or insufficient or void instrument, the burden of proof was on the defendant, referring to s 101 of the Evidence Act 1950 ('the EA'). On the other hand, the defendant submitted that (i) since the plaintiff had alleged the existence of a positive fact, ie that the power of attorney from Quah to Maung was genuine, the burden of proof was cast on the plaintiff; (ii) the power of attorney from
- B** Quah to Maung had not been executed by Quah whose signature has been forged for this purpose; and that the expert evidence of SP1 and SP2 should be accepted under s 45 of the EA; (iii) since the amendments to the charge instrument was not initialled by Maung, this showed that Maung had not executed the charge pursuant to the power of attorney from Quah to Maung, and therefore the charge was an insufficient or void instrument; and (iv) the
- C** plaintiff's failure to call Maung as a witness would give rise to an adverse inference under s 114 (g) of the EA; and (v) relying on s 67 of EA, the signature in the power of attorney from Quah to Maung must be proven.
- D** **Held**, allowing the plaintiff's charge action and dismissing the defendant's suit:
- (1) The burden of proof, as contained in s 101 of the EA, is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. On the other hand, the *onus* of proof relates to the responsibility of adducing evidence in order to discharge the burden of proof. The *onus*, as opposed to burden, is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to ss 102 and 103 of the EA, if the party with whom the *onus* lies, whether initially or subsequently, as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail (see para 27); *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 followed.
- E**
- F**
- G** (2) In both proceedings, *viz* the charge action and the civil suit, the burden was on the chargor/defendant to prove 'cause to the contrary' under s256(3) of the National Land Code ('the NLC'), ie the exception to the indefeasibility doctrine under s 340(2)(b) of the NLC, which was also the ground relied upon by the defendant in the civil suit (see para 33); *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 followed.
- H** (3) In addition, as the defendant desired this court to give judgment as to its legal right or liability, dependent on the existence of facts which it asserts such as forgery or insufficient or void instrument in the instant case, it must prove that those facts exists in accordance with s 101 of the EA (see para 34).
- I** (4) Section 67 of the EA refers to documents other than documents required by law to be attested. Since the power of attorney from Quah to Maung was a document required by law, s 67 had no application here. On the

other hand, the plaintiff as the person denying the execution bears the burden of proving that the signature was not his, under s 101 of the EA, and after having discharged this burden of proof, the onus of proof would shift to the other party, ie the bank. In the instant case, the defendant in stating that Quah's signature had been forged did not call Quah to give evidence. Hence, the defendant had not discharged the burden of proof in order to shift the onus of proof to the plaintiff (see paras 39 and 41–42).

- (5) The issue of forgery being raised in a civil case would attract the standard of proof on a balance of probabilities; *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yek Eng* [2001] 1 MLJ 241 followed. Based on the expert evidence of SP1 and SP2 and the opinion of the former Director-General of the chemistry department, the defendant had not discharged the burden of proof that Quah's signature in the power of attorney from Quah to Maung had been forged, in order to shift the *onus* of proof to the plaintiff to prove that it had not been forged. The defendant had not proven the element of forgery on a balance of probabilities (see paras 37 and 47).

- (6) There can be no doubt that the amendments to the charge instrument had been duly initialled by the attesting solicitor SD1 pursuant to para 11A, 10th Schedule to the NLC which provides that, '... erroneous entries are to be neatly cancelled so as not to be rendered illegible and are to be duly initialled by the attesting officer' who under para 1(1)(e) of the Fifth Schedule to the NLC includes 'an advocate and solicitor' (see para 50).

- (7) The amended charge instrument had been properly registered by the land administrator as there was no statutory provision in the NLC which required the person, Maung, who had executed the charge as the attorney of the chargor, being the defendant, to initial on the amendments (see para 51).

- (8) On the issue of drawing an adverse inference under s 114(g) of the EA by reason of the plaintiff's failure to call Maung as a witness, since there was no provision of the law contained in the NLC to require the amendments to be initialed by Maung as a witness, there was no necessity or the relevance of invoking s 114(g). In the circumstances, the charge executed by Maung was not obtained by means of an insufficient or void instrument (see paras 56–57).

[Bahasa Malaysia summary]

Defendan, sebuah hotel, telah melaksanakan surat kuasa wakil berpihak kepada Quah Lian Eng ('surat kuasa wakil kepada Quah') berkenaan dengan hartanah defendan di Melaka Tengan ('hartanah tersebut'). Pihak plaintif,

- A** sebuah bank, telah memberi kemudahan perbankan kepada Lamont Trading, di mana Quah adalah seorang pengarah, di atas mana Maung telah melaksanakan suatu gadaian pihak ketiga ('gadaian tersebut') berpihak kepada plaintif atas autoriti surat kuasa wakil yang diberikan oleh Quah kepada Maung ke atas hartanah tersebut ('surat kuasa wakil daripada Quah kepada Maung'). Surat kuasa wakil daripada Quah kepada Maung telah dilaksanakan sebelumnya dan disahkan oleh seorang peguam yang tidak dipanggil sebagai saksi. Apabila terdapat salah ingkar daripada defendan, plaintif telah memulakan tindakan gadaian terhadap defendan ('tindakan gadaian'). Sebagai respons, defendan telah memfailkan tindakan sivil terhadap plaintif ('tindakan sivil') sambil mengadu bahawa gadaian tersebut boleh disangkal kerana ia dilaksanakan menurut suatu instrumen yang berkurangan atau taksah, dalam mana tanda tangan Quah telah dipalsukan, yang menyebabkan pelaksanaan gadaian oleh Maung salah. Kedua-dua prosiding dibicarakan sekali.
- B**
- C**
- D** Defendan telah memanggil dua pemeriksa dokumen, SP1 dan SP2, kedua-duanya yang telah memberi keterangan bahawa tidak dapat sampel tandatangan yang mencukupi untuk membuat perbandingan. Plaintif mengadu bahawa oleh sebab defendan telah mengutarakan isu instrumen yang dipalsukan, berkurangan atau taksah, maka beban membuktikan terletak pada defendan, dengan merujuk kepada s 101 Akta Keterangan ('Akta'). Sebaliknya, defendan telah mengadu bahawa (i) oleh sebab plaintif telah mengatakan bahawa wujudnya suatu fakta positif, iaitu surat kuasa wakil daripada Quah kepada Maung adalah benar, maka beban membuktikan terletak padanya; (ii) surat kuasa wakil daripada Quah kepada Maung tidak dilaksanakan Quah di mana tanda tangannya telah dipalsukan untuk tujuan sedemikian; dan keterangan pakar daripada SP1 dan SP2 harus diterima di bawah s 45 Akta; (iii) oleh sebab pindaan kepada instrumen gadaian tidak ditandakan oleh Maung, ini menunjukkan bahawa Maung tidak melaksanakan gadaian tersebut menurut surat kuasa wakil daripada Quah kepada Maung, dan dengan itu gadaian itu merupakan suatu instrumen yang berkurangan atau taksah; dan (v) kegagalan plaintif untuk memanggil Maung sebagai saksi akan membawa kepada andaian yang memudaratkan di bawah s114(g) Akta; dan (v) berasaskan s 67 Akta, tanda tangan di dalam surat kuasa wakil daripada Quah kepada Maung harus dibuktikan.
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Diputuskan, membenarkan tindakan gadaian plaintif dan membatalkan guaman defendan:

- H**
- (1) Beban membuktikan, seperti yang terkandung di dalam s 101 Akta, adalah beban untuk mengasaskan suatu tindakan dan ia terletak kepada pihak yang memajukan pengesahan isu berkenaan dalam keseluruhan perbicaraan. Sebaliknya, *onus* bukti merujuk kepada tanggungjawab memajukan bukti untuk memuaskan beban membuktikan. *Onus*, bertentangan dengan beban, adalah tidak stabil dan kerap kali berubah semasa perbicaraan dari satu pihak ke satu pihak yang lain menurut tahap keterangan dan yang lebih
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meyakinkan. Pengubahan tersebut adalah suatu proses yang berterusan dalam penilaian keterangan. Menurut ss 102 dan 103 Akta, sekiranya pihak yang mempunyai *onus* tersebut, sama ada pada permulaan atau selepasnya, atas sebab pengubahannya tidak memberikan apa-apa keterangan atau selanjutnya atau memberi keterangan yang tidak mencukupi, pihak tersebut harus gagal (lihat perenggan 27); *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 diikuti.

- (2) Dalam kedua-dua prosiding tersebut, iaitu tindakan gadaian dan guaman sivil, beban membuktikan terletak pada penggadai/defendan untuk membuktikan “cause to the contrary” di bawah s 256(3) Kanuan Tanah Negara (“KTN”), iaitu pengecualian kepada doktrin penyangkalan di bawah s 340(2)(b) KTN, yang juga adalah alasan yang disandarkan oleh defendan di dalam guaman sivil tersebut (lihat perenggan 33); *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 diikuti.
- (3) Tambahan pula, oleh sebab defendan berhasrat untuk mahkamah ini untuk memberikan penghakiman terhadap hak atau liabilitinya yang sah, bergantung pada kewujudan fakta yang dimajukan olehnya seperti instrumen yang dipalsukan, berkurangan atau taksah di dalam kes ini, ia harus membuktikan bahawa fakta-fakta tersebut wujud seperti yang diperuntukkan di bawah s 101 Akta (lihat perenggan 34).
- (4) Seksyen 67 Akta merujuk kepada dokumen-dokumen yang lain daripada dokumen-dokumen yang perlu diakusaksikan menurut undang-undang. Oleh sebab surat kuasa wakil daripada Quah kepada Maung adalah suatu dokumen yang dimestikan menurut undang-undang, s 67 tidak terpakai di sini. Sebaliknya, plaintif sebagai pihak yang menyangkal pelaksanaan mempunyai beban untuk membuktikan bahawa tanda tangan tersebut bukan miliknya, di bawah s 101 Akta, dan selepas memuaskan beban membuktikan ini, *onus* bukti berpindah kepada pihak yang lagi satu, iaitu pihak bank. Di dalam kes semasa, defendan dalam menyatakan bahawa tanda tangan Quah telah dipalsukan tidak memanggil Quah untuk memberi keterangan. Oleh yang demikian, defendan tidak memuaskan beban membuktikan untuk memindahkan *onus* bukti kepada plaintif (lihat perenggan 39 dan 41–42).
- (5) Isu pemalsuan yang diutarakan di dalam kes sivil akan tahap pembuktian adalah pada imbalan kebarangkalian; *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yek Eng* [2001] 1 MLJ 241 diikuti. Berasaskan keterangan pakar oleh SP1 Dan SP2 dan pendapat bekas ketua pengarah Jabatan Kimia, defendan tidak memuaskan beban membuktikan bahawa tanda tangan Quah di dalam surat kuasa wakil daripada Quah kepada Maung telah dipalsukan, untuk memindah *onus* bukti daripada plaintif untuk membuktikan yang ia tidak dipalsukan. Defendan gagal membuktikan elemen pemalsuan atas imbalan kebarangkalian (lihat perenggan 37 dan 47).

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- A** (6) Tidak terdapat keraguan bahawa pindaan kepada instrumen gadaian telah ditandakan oleh peguam yang telah akusaksi berkenaan, SD1, menurut perenggan 11A, Jadual 10 kepada KTN yang memperuntukkan bahawa ‘... erroneous entries are to be neatly cancelled so as not to be rendered illegible and are to be duly initialled by the attesting officer’ yang
- B** mana di bawah perenggan 1(1)(e) Jadual kelima kepada KTN melibatkan seorang “peguam bela dan peguam cara” (lihat perenggan 51).
- (7) Instrumen gadaian yang telah dipinda telah didaftarkan dengan sempurna oleh pentadbir tanah oleh sebab tidak terdapat peruntukan undang-undang di dalam KTN yang memerlukan Maung, yang telah melaksanakan gadaian tersebut sebagai peguam penggadai, yakni defendan,
- C** untuk menandakan pindaan tersebut (lihat perenggan 51).
- (8) Berkenaan dengan isu mewujudkan andaian yang memudaratkan di bawah s 114(g) Akta atas alasan kegagalan plaintif untuk memanggil Maung sebagai saksi. Oleh sebab tidak terdapat peruntukan undang-undang didalan KTN yang memerlukan pindaan-pindaan ditandakan oleh Maung sebagai saksi, tidak terdapat keperluan atau kerelevanan untuk memakai s 114(g). Dalam keadaan sedemikian, gadaian yang dilaksanakan oleh Maung tidak didapatkan melalui suatu instrumen yang berkurangan atau dipalsukan (lihat perenggan 56–57).
- D**
- E**

Notes

For cases on burden of proving forgery of signature, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 283–285.

- F** For cases on documentary evidence, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 668–789.

For cases on handwriting expert's evidence, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 1329–1334.

For cases on adverse inference for failure to call witness, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 116–129.

- G** For cases on applications for order for sale, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1471–1500.

Cases referred to

- H** *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yek Eng* [2001] 1 MLJ 241 (folld)
- Bank Pertanian Malaysia v Blue Valley Plantations Bhd & Ors* [2002] MLJU 212 (refd)
- Chan Yoke Lain (Administrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 MLJ 303 (refd)
- I** *Chew Lip Seng v Perwira Habib Bank (M) Bhd* [1999] 1 MLJ 310 (refd)
- International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 (folld)
- Low Lee Lion v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 (folld)

Muniandy & Anor v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416 (refd) **A**
Muniandy & Anor v Muhd Abdul Kader Muhd Sabeed & Ors [1990] 2 CLJ (Rep) 507 (refd)

Spector v Ageda [1971] 3 All ER 417 (refd)

Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697 (refd)

Tenaga National Bhd v Pervaja Steel Sdn Bhd [1995] 4 MLJ 673 (refd) **B**

Legislation referred to

Evidence Act 1950 ss 68, 73(1), 101, 114(g)

National Land Code s 256

Powers of Attorney Act 1949 s 3 **C**

Rules of the High Court 1980 O 83

V Kumaresan (Huang Khairun Kumar & Assoc) for the plaintiff.

Azad Bashir (Nizam Bashir with him) (Bashir, Wong, Chin & Partners) for the defendant. **D**

Low Hop Bing J:

I CONSOLIDATION OF PROCEEDINGS

[1] There are two concurrent proceedings before me, *viz* a charge action *vide* OS 24(31)–31 of 1987 ('the charge action') filed by the plaintiff Oriental Bank Bhd, now known as EON Bank Bhd ('EON Bank') against the defendant Hotel Flamingo Sdn Bhd ('Hotel Flamingo') for an order for sale under s 256 of the National Land Code; and a civil suit *vide* CS No 22–39 of 1986 ('the civil suit') filed by Hotel Flamingo against, *inter alia*, EON Bank for declaratory reliefs and damages. **E**

[2] Both the proceedings had been consolidated and heard by way of a full trial. **F**

II FINDING OF FACTS

[3] Prior to the transactions between EON Bank and Hotel Flamingo, Scotch Leasing Sdn Bhd ('Scotch Leasing') had given certain loans to Hotel Flamingo. By way of security, Hotel Flamingo had executed, *inter alia*, a power of attorney dated 25 May 1984 in favour of one Quah Lian Eng ('the PA from Hotel Flamingo to Quah'). Quah was a nominee of Scotch Leasing and also a director of Lamont Trading. The PA from Hotel Flamingo to Quah concerns Hotel Flamingo's property held under ACT No 238, Town Area XIX, district of Melaka Tengah ('the property'). **G**

[4] The PA from Hotel Flamingo to Quah gave Quah the power to 'charge or mortgage our said property and for this purpose to sign all necessary charges and other documents' (cl 12) and to 'substitute and appoint from time to time one or more attorney or attorneys with the same or limited powers and such **H** **I**

A substitute or substitutes at pleasure to remove and appoint another or others to appoint' (cl 17).

[5] On 15 November 1985, Scotch Leasing filed a claim against Hotel Flamingo vide Kuala Lumpur High Court (Commercial Division) CS No C7520–1985.

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[6] In order to settle the dispute between the aforesaid parties, Scotch Leasing, Lamont Trading and a director of Scotch Leasing, one Maung Hong Kong @ Lim Yong Sai ('Maung') made representations to Hotel Flamingo to enter into a tripartite agreement but the tripartite agreement did not eventuate.

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[7] On 19 April 1986, EON Bank gave Lamont Trading the following banking facilities:

(1) overdraft of RM500,000; and

D (2) letters of credit, trust receipt and banker's acceptance amounting to RM1.5 million.

[8] On 28 April 1986, Maung executed a third party charge ('the charge') on the authority of the power of attorney dated 1 November 1985 granted by Quah to Maung ('the first PA from Quah to Maung'). Upon the presentation of the charge on 7 May 1986, it was rejected by the land office allegedly on the ground that both the PA from Hotel Flamingo to Quah and the PA from Quah to Maung did not give Maung such authority.

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[9] On 7 May 1986, Quah as Hotel Flamingo's representative granted Maung another power of attorney ('the second PA from Quah to Maung') on the basis of the PA from Hotel Flamingo to Quah.

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[10] The second PA from Quah to Maung expressly stated that Quah had appointed Maung 'as a substituted attorney for Hotel Flamingo Sdn Bhd and to be its attorney for it and in its name or otherwise to do all things' relating to the property.

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[11] Pursuant to the second PA from Quah to Maung, amendments were made to the charge, in particular the capacity in which Maung had executed the charge, ie 'as Attorney for Hotel Flamingo Sdn Bhd', vide 'Power of Attorney Jilid 22 Folio 1', the date of attestation by solicitors from '28 April 1986' to '9May 1986'. No amendment was made to the property and the loan sum.

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[12] EON Bank's solicitor SD1 testified that she had prepared the charge instrument on 28 April 1986. Subsequently she did the above amendments and initialed thereon in the presence of Maung. Upon second presentation, the charge was accepted by the land office vide presentation No 1251/86 Jilid No 265 Folio 33. She explained that Maung did not have to initial as she had initialed on all amendments as the attesting solicitor.

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[13] SP3, the assistant land administrator in the Melaka Registry of Titles testified that the rejected charge instrument dated 28 April 1986 could be used and registered as the charge for 9 May 1986. This witness further testified that the charge was registered on 9 May 1986 on the basis of the second PA from Quah to Maung. However he did testify that Maung had to initial on the said amendments. I shall revert to this evidence later in my judgment.

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[14] On 24 June 1986, Hotel Flamingo's solicitors Messrs Bashir & Co gave notice to EON Bank stating, *inter alia*, that Maung did not have the authority to charge the property to EON Bank. Hotel Flamingo also lodged a police report to the same effect on 10 November 1986.

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[15] Upon default by Hotel Flamingo, EON Bank issued a notice of demand which was followed by a statutory notice in Form 16D dated 11 November 1986 ('the statutory notice'). In the light of non-compliance therewith, EON Bank filed the charge action against Hotel Flamingo.

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[16] As at 18 March 2004, the banking facilities showed an outstanding sum of RM9,813,975.64, the particulars of which are as follows:

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- | | | |
|---|----------------|--|
| (1) overdraft facility | RM216,776.45 | |
| (2) letters of credit, trust receipt and bankers acceptance | RM9,597,199.19 | |
| | ----- | |
| | RM9,813,975.64 | |

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[17] Meanwhile, Hotel Flamingo has filed the civil suit alleging, *inter alia*, that the charge was defeasible as it was executed pursuant to an insufficient or void instrument, ie the second PA from Quah to Maung wherein Quah's signature had been forged, as a result of which Maung's execution of the charge was wrongful.

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[18] The second PA from Quah to Maung was executed before and authenticated by Mr Lim Soh Wah, an advocate and solicitor of the High Court of Malaya practising in Kuala Lumpur, who was not called as a witness.

[19] Hotel Flamingo called two document examiners, viz SP1 from the chemistry department and SP2 in private practice.

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[20] SP1 testified that the four sample signatures given to her were not sufficient to make a comparison, as not less than five sample signatures were required. Further, two of the sample signatures were Photostatted copies from which no comparison could be made.

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[21] SP2, the document examiner in private practice, testified that to yield an acceptable comparison of the disputed signature, there is a need to have not less than 10 specimen signatures. He admitted that two Photostatted copies of the sample signatures, viz S1 and S2 were different in print quality from the original document bearing the sample signature in S3 (exh P2). He agreed that no two signatures can be exactly alike or identical.

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- A** [22] Hotel Flamingo also called SP4 one Chong Nyong Soi who testified that he knew from one Chai Kin Huat that Quah could not be traced to attend court as a witness, neither could Chai attend as a witness.

III QUESTION FOR DETERMINATION

- B** [23] Parties have agreed that the sole question for determination is whether the charge is defeasible on the ground that it was obtained by forgery or by means of an insufficient or void instrument.

IV BURDEN OF PROOF

- C** [24] Mr V Kumaresan, learned counsel for EON Bank, submitted that since Hotel Flamingo has alleged forgery or insufficient or void instrument, the burden of proof is on Hotel Flamingo, referring to s 101 of the Evidence Act 1950; *Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd* [1995] 4 MLJ 673 (HC); *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 (FC); and *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697. He added that Hotel Flamingo should at least adduce direct or best evidence in order to establish forgery or insufficient or void instrument and that EON Bank could thereafter call evidence to prove the absence of forgery or insufficient or void instrument, referring to, *Evidence: Practice and Procedure* (3rd Ed, 2003) p 748 by Augustine Paul (now JCA).

- F** [25] In this regard, learned counsel Mr Azad Bashir assisted by Mr Nizam Bashir contended for Hotel Flamingo that since EON Bank has alleged the existence of a positive fact, ie that the second PA from Quah to Maung was genuine, the burden of proof is cast on EON Bank, relying on, inter alia, s 101 of the Evidence Act 1950; *Sarkar's Law of Evidence* p 1333; *Muniandy & Anor v Mubd Abdul Kader Mubd Saheed & Ors* [1990] 2 CLJ (Rep) 507; *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 (SC).

- G** [26] At this juncture, it is appropriate for me to state that the burden of proof is distinguishable from the onus of proof.

- H** [27] Burden of proof as contained in s 101 is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. On the other hand, the onus of proof relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to ss 102 and 103 of the Evidence Act, if the party with whom the onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail — *per* Salleh Abas FCJ (later LP) in delivering the judgment of the Federal Court in *International Times* at p 87.

[28] *International Times* was followed by Augustine Paul JC (now JCA) in *Tan Kim Chuan* where the learned judge at p 706 said:

When a party on whom the burden of proof lies has discharged it, then the evidential burden shifts to the other party. What shifts is the burden of adducing evidence to discharge that burden. When the burden shifts to the other party, it can be discharged by cross-examination of witnesses or by giving evidence himself or by a combination of the different methods.

[29] In my judgment, the subject matter and nature of the proceedings would have a direct bearing on the burden of proof which is to be cast on a particular party.

[30] In a charge action such as in the instant case filed by EON Bank against Hotel Flamingo under O 83 of the Rules of the High Court 1980 and s 256 of the National Land Code, it is instructive to refer to the judgment of Gopal Sri Ram JCA delivered for the Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 where at p 82D the learned judge referred to s256(3) of the National Land Code 1965 which where relevant provides as follows:

- (3) On any such application, the court shall order the sale of the land to which the charge relates unless it is satisfied of the existence of *cause to the contrary*. (Emphasis added.)

[31] The learned judge explained at p 82 F–G, 83F and 83H–I that ‘cause to the contrary’ might be established only in three categories of cases. For the purposes of the facts of this case and the agreed question for determination, it is only necessary for me to refer to the first category, ie whether the chargor in this case, Hotel Flamingo, was able to bring its case within any of the exceptions to the indefeasibility doctrine in s 340 of the Code.

[32] The civil suit filed by the chargor (Hotel Flamingo) against the chargee EON Bank is also based on the ground of an exception to the indefeasibility doctrine under s 340(2)(b) of the Code, ie that the registration of the charge was ‘obtained by forgery, or by means of an insufficient or void instrument’.

[33] I do not entertain any doubt that in both the proceedings before me, *viz* the charge action and the civil suit, the burden is on the chargor (Hotel Flamingo) to prove ‘cause to the contrary’ under s 256(3) within the first category, ie the exception to the indefeasibility doctrine under s 340(2)(b) of the Code, which was also the ground relied upon by Hotel Flamingo in the civil suit.

[34] In addition, as Hotel Flamingo desires this court to give judgment as to its legal right or liability, dependent on the existence of facts which it asserts such as forgery or insufficient or void instrument in the instant case, it must prove that those facts exists. This has been stated so clearly in s 101 of the Evidence Act 1950 which merits reproduction as follows:

101Burden of proof.

- A** (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

B (See also my judgment in *Tenaga Nasional* at p 676).

V FORGERY

C [35] It was submitted for Hotel Flamingo that the second PA from Quah to Maung has not been executed by Quah whose signature has been forged for this purpose; and that the expert evidence of SP1 and SP2 should be accepted under s 45 of the Evidence Act 1950. Hotel Flamingo also relied on s 67 thereof.

D [36] On the other hand, EON Bank contended that the second PA from Quah to Maung has complied with s 3 of the Powers of Attorney Act 1949 and that Hotel Flamingo should call Mr Lim Soh Wah the solicitor attesting the power of attorney as a witness under s 68 of the Evidence Act 1950 for the best and direct evidence on the authority of *Chan Yoke Lain (Administrator of the estate of Chong Yoke Fab, deceased) v Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 MLJ 303; and the article entitled 'Examination of Handwriting and Signatures' by Harcharan Singh Tara [1995] 3 MLJ i ('the article').

F [37] It is necessary for me to hark back to first principles and note that the issue of forgery being raised in a civil case would attract the standard of proof on a balance of probabilities: per Eusoff Chin CJ in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yek Eng* [2001] 1 MLJ 241.

G [38] In the light of my finding that Hotel Flamingo bears the burden of proving forgery, I shall now consider whether Hotel Flamingo has discharged this burden on a balance of probabilities, ie that it is probably true that Quah's signature has been forged.

H [39] Section 67 of the Evidence Act 1950 provides, inter alia, that if a document is alleged to be signed by any person, the signature as is alleged to be in that person's handwriting shall be proved to be in his handwriting. *Sarkar's Law of Evidence* at p 1000, commenting on the equipollent s 67 of the Indian Evidence Act, says that this section refers to documents other than documents required by law to be attested. Since the second PA from Quah to Maung is a document required by law, ie s 3 of the Powers of Attorney Act 1949 to be attested by, eg an advocate and solicitor, I am of the view that s67 has no application here.

I [40] However, I am of the view that s 68 of the same Act applies and it reads:

68 If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at best has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence.

[41] Section 68 was considered by NH Chan J (later JCA) in *Chew Lip Seng v Perwira Habib Bank (M) Bhd* [1999] 1 MLJ 310 where the plaintiff sought a declaration that a charge on his property to the defendant bank as security for banking facilities was not executed by him and that the signature on the charge document was forged. At the trial, the plaintiff gave evidence denying that the charge was executed by him. He also brought a government document examiner as an expert witness to give evidence that the signature on the charge document was not his. With that evidence, the learned judge held that that throws the onus on the defendant who has to prove that the charge was executed by the plaintiff on the basis of s 68. The tenor of the judgment shows that the plaintiff as the person denying the execution bears the burden of proving that the signature was not his, under s 101 of the Evidence Act, and having discharged this burden of proof, the onus of proof shifts to the other party, ie the bank.

[42] In the instant case, Hotel Flamingo in stating that Quah's signature had been forged did not call Quah to give evidence. Hence, Hotel Flamingo has not discharged the burden of proof in order to shift the onus of proof to EON Bank.

[43] Now, the forensic evidence must be considered. At this juncture, I must immediately emphasise that both SP1 and SP2 have been chemists and forensic consultants in the Chemistry Department of Malaysia for several decades, during which SP2 has also been in private practice, and they have attained commendable seniority after having obtained their academic qualifications and professional experience especially in document examination and handwriting, thereby making them eminently suitable and qualified to be accorded, which I do hereby accord upon them, the status of experts under s 45 of the Evidence Act 1950. Section 73(1) of the Evidence Act 1950 which provides for the method of proving authorship of signatures by way of comparing the purported signature with the genuine signature, where relevant, reads:

In order to ascertain whether a signature is that of the person by whom it purports to have been written or made, any signature admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness with the one which is to be proved.

[44] As narrated in the above finding of facts, document examiner SP1 conceded that normally five specimen signatures were necessary for purposes of comparison but there were only four sample signatures, which she agreed were insufficient. She added that out of the four sample signatures, two were Photostatted copies.

- A** [45] A revisit to the evidence also shows that the other document examiner SP2 agreed that normally to yield an acceptable comparison of the disputed signature, there was a need to make a comparison of the disputed signature with not less than 10 specimen signatures, and that specimen signatures in S1 and S2 were Photostatted copies which were different in print quality as the original documents.

- B**
- C** [46] In respect of the necessary number of specimen signatures to be used for comparison and the use of Photostatted copies, it is useful to refer to the article by Mr Harcharan Singh Tara, a former Director-General of the chemistry department, and an advocate and solicitor who said that a genuine signature may be disclaimed when a deal turns bad. He explained that the most important ingredient in signature comparison is the availability of extensive specimen signatures and that about 10 to 20 specimen signatures are sufficient. He added that Photostatted copies of disputed signatures are not suitable for examination and all attempts should be made to obtain the originals.

- D** [47] In the instant case, I am prepared to accept the evidence of SP1 and SP2 and the opinion of the former Director-General of the chemistry department, to the effect that five to 20 original specimen signatures would be sufficient for purposes of comparison, but since Hotel Flamingo had only made available four specimen signatures, viz two original and two Photostatted copies for comparison, I am unable to conclude that Hotel Flamingo has discharged the burden of proof that Quah's signature in the second PA from Quah to Maung has been forged, in order to shift the onus of proof to EON Bank to prove that it has not been forged. I therefore hold that Hotel Flamingo has not proved the element of forgery on a balance of probabilities.

- E**
- F** VI INSUFFICIENT OR VOID INSTRUMENT

[48] It was submitted for Hotel Flamingo that:

- G** (1) the amendments to the charge instrument without being initialed by Maung showed that Maung had not executed the charge pursuant to the second PA from Quah to Maung, and therefore the charge was an insufficient or void instrument, seeking support from *Spector v Ageda* [1971] 3 All ER 417; and *Bank Pertanian Malaysia v Blue Valley Plantations Bhd & Ors* [2002] MLJU 212; and
- H** (2) EON Bank's failure to call Maung as a witness would give rise to an adverse inference under s 114 (g) of the Evidence Act 1950.

- I** [49] For EON Bank, it was argued that the charge was not an insufficient or void instrument as the amendments have been duly initialed by the attesting solicitor under para 11A, Tenth Schedule to the National Land Code, read with para 1(1)(e), Fifth Schedule to the same Code; and that s 114(g) had no application here.

[50] In my judgment, there can be no doubt that the amendments to the charge instrument had been duly initialled by the attesting solicitor SD1 pursuant to para 11A, Tenth Schedule to the Code which provides that 'erroneous entries are to be neatly cancelled so as not to be rendered illegible and are to be duly initialled by the attesting officer' who under para 1(1)(e) of the fifth schedule to the Code includes 'an advocate and solicitor'.

[51] There is also no doubt that the amended charge instrument had been properly registered by the land administrator as there is no statutory provision in the National Land Code which requires the person, Maung, who had executed the charge as the attorney of the chargor, Hotel Flamingo, to initial on the amendments. In this regard, I regret to state that I am unable to accept the bare evidence of SP3, the assistant land administrator, that Maung had to initial on the amendments. SP3 did not support his opinion by reference to any provision of the law contained in the National Land Code. Further, his opinion is in direct contradiction to the due registration of the charge by his land registry.

[52] The authorities cited for Hotel Flamingo on this issue deserve my consideration now.

[53] In *Spector*, the memorandum of agreement recited that M had promised to lend to the defendant and another person ('the borrowers') £1040 'with interest at the rate of 2% per month'. As a matter of fact, the memorandum was inaccurate as the amount M had lent to the borrowers was £1000 at 2% per month. After its execution, the memorandum had been altered in several material respects by the plaintiff; in particular, at the time of execution, there was no provision quantifying the amount of interest. Besides, the words 'with interest at the rate of 2% per month' had been subsequently added by the plaintiff. Megarry J held, *inter alia*, that the alteration as regards interest was a material alteration which rendered the memorandum void.

[54] The charge instrument before me did not contain the material alteration as found in *Spector*. As alluded above, the property and the terms and conditions of the charge remained intact. *Bank Pertanian* concerns a charge action to obtain an order for sale of the entire property of 508.875 acres of land, when the loan was for the purchase of 300 acres thereof. The charge document in Form 16A contained the original typewritten figures '300/508.875' which were subsequently deleted and substituted with the handwritten word '*semua*' (all). The amendment was done and initialed by the solicitors acting for the plaintiff at that time. The facts also revealed that the remaining 208.875 acres had been sold to third parties viz the interveners who were already in occupation thereof long before the creation of the charge. Ramly Ali J in refusing the order for sale held, *inter alia*, that the amendment to the charge was very vital and struck adversely on the interest of the charger and the interveners.

A [55] It is to be observed that the amendment in *Bank Pertanian* were again vastly different from that in the instant case where no amendment was made to the property which remained exactly the same.

B [56] On the issue of drawing an adverse inference under s 114(g) of the Evidence Act 1950 by reason of EON Bank's failure to call Maung as a witness, I am of the view that since there is no provision of the law contained in the National Land Code to require the amendments to be initialed by Maung as a witness, I am unable to see the necessity or the relevance of invoking s 114(g).

C [57] In the circumstances, I hold that the charge which has originally been executed by Maung and amended pursuant to the second PA from Quah to Maung was not obtained by means of an insufficient or void instrument.

VII CONCLUSION

D [58] On the foregoing grounds, I hold that the answer to the above agreed question for determination is in the negative. Hence I make an order in terms of EON Bank's charge action in OS 24 (31)–31–1987 and dismiss Hotel Flamingo's claim in CS No 22–39 of 1986 with costs.

Plaintiff's action allowed and defendant's suit dismissed.

E

Reported by Loo Lai Mee

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